NO. 541

IN THE

SUPREME COURT OF THE UNITED STATES

LOUIS LeLAURIN
Petitioner

v.

FROST NATIONAL BANK TRUSTEE et al
Respondent

PETITION FOR WRIT OF CERTIORARI

FRANK Y. HILL, JR.
501 Alamo National Bldg.
San Antonio, Texas

EDWARD V. DYLLA
1500 Majestic Bldg.
San Antonio, Texas
Attorney of Record

Attorneys for Petitioner
on Petition for Writ of
Certiorari

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Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now, Louis LeLaurin, Petitioner, and petitions this Honorable Court to issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that said Court's final decision in Case Number 24,779 on the docket of said Court, and styled Louis LeLaurin v. Frost National Bank of San Antonio, Texas, as Trustee under the will of Jack Ammann, Deceased, et al; also styled Frost National Bank of San Antonio, Texas, as Trustee under the will of Jack Ammann, Deceased, et al; v.

Louis LeLaurin,[1] a copy of which is attached hereto as Appendix "A," and in support of said petition would show unto this Honorable Court the following:

JURISDICTION

The jurisdiction of this Honorable Court is sought to be invoked on the following grounds:

The decision of the Court of Appeals herein sought to be reviewed is in conflict with the decision of another Court of Appeals on the same matter;

The decision of the Court of Appeals herein sought to be reviewed involves an extremely important question of Federal law relating to allowances of attorney's fees in bankruptcy proceedings which this Honorable Court has never specifically ruled upon, though there is substantial law directly supporting Petitioner's position, and this Court should therefore settle once and for all the question herein presented.

The decision of the lower Court herein sought to be reviewed was handed down on March 21, 1968, and Petitioner's motion for rehearing was denied without written opinion by said Court on June 20, 1968.

The statutory provision herein relied upon to confer upon this Honorable Court jurisdiction to review the judgment below is Title 28, United States Code, Section 1254, in its pertinent parts as follows:

"Cases in the Court of Appeals may be

1 F. ____ 2d ____,

reviewed by the Supreme Court by the following methods:

"By writ of certiorari granted upon the petition of any party to any civil * * * case, before or after rendition of judgment or decree; ****"

QUESTION PRESENTED

Whether the State or the Federal Courts shall determine allowances against bankrupt estates for attorney's fees upon claims allowed by a referee in bankruptcy?

CONSTITUTIONAL PROVISION AND STATUES

ARTICLE 1 § 8 as follows:

"The Congress shall have Power To * * * establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; ****"

TITLE 11 U.S.C. § 1 (10) as follows:

" 'Courts of bankruptcy' shall include the United States district courts * * * to which this title is or may hereafter be applicable; ****"

TITLE 11 U.S.C. § 11 as follows:

"(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title. * * *

as they are now or may be hereafter held, to–

> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.
>
> "(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, ****"
>
> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title, Provided, however, That an injunction to restrain a court may be issued by the judge only; ****"

STATEMENT

Petitioner was retained by the Frost National Bank of San Antonio, Texas to pursue a claim held by the Bank as testamentary trustee against Geotechnics and Resources, Inc., a bankrupt. The Bank's claim was evidenced by a promissory note[2] on which $333,056.38 was due and unpaid, and a deed of trust on realty occupied by the bankrupt to secure the note.

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2 The note required the Maker to pay 10% of principal and interest as attorney's fees if the note was collected, inter alia, in bankruptcy proceedings.

At the time Petitioner was retained to represent the Bank, no agreement between them was made concerning Petitioner's fee.[3]

Subsequent to his employment, Petitioner appeared in the bankruptcy proceedings on behalf of the Bank and was successful in obtaining an Order from the Referee allowing a secured claim in the amount of $358,056.38, consisting of $333,056.38 principal and interest due under the note, and $25,000.00 attorney's fees.[4] The order further determined that the mortgaged premises were burdensome to the bankrupt estate and were abandoned with leave to the Bank to foreclose its mortgage. Further, the Order determined that the reasonable value of the secured premises was $225,000.00. Hence the entire secured claim of $358,056.38 was reduced by the value of the security, i.e. $225,000.00. The Referee in his Order then allowed the balance of the claim of $133,056.38 as an unsecured claim. Thereafter, the Trustee paid to the Petitioner the sum of $15,590.69 representing a dividend on the unsecured balance of the claim of $133,056.38. Petitioner retains this sum in his possession under a Claim of Lien for his fee.[5]

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3 Petitioner and the Bank have agreed that in the absence of a fixed agreement, the law requires the Bank to pay Petitioner a reasonable fee for services rendered.

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4 A Proof of Secured Claim, verified by the Bank's Trust Officer was filed wherein it was asserted that the bankrupt should be required to pay $33,305.64 attorney's fees; later, Petitioner filed a Petition in Intervention setting forth the totality of the Bank's claim resulting in the Referee's Order with which we are concerned.

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5 At or about the time Petitioner was retained, the Bank paid him by way of a retainer the sum of $2,500.00 which must be taken into account in considering the figures here stated.

Petitioner and the Bank were unable to agree upon the sum which should be paid to Petitioner for his services. Petitioner claims that the Referee's discretionary allowance of the sum of $25,000.00 as an attorney's fee is determinative of the issue of the reasonable value of the services which Petitioner performed for the Bank in the bankruptcy proceedings. The Bank denied that the Referee's Order amounted to anything more than an allowance to the Bank to make the Bank whole since the note had to be collected through bankruptcy proceedings, and that the Referee's Order fixing $25,000.00 as attorney fees was not determinative of the reasonable value of the services performed by Petitioner for the Bank in the bankruptcy proceedings.[6]

Subsequently, Petitioner filed in the District Court an ancillary Bill to enforce the final orders and decrees of that Court, specifically the Referee's Order allowing the Bank's claim which included the allowance of attorney's fees. Petitioner asserted that the Bank was unlawfully withholding $16,798.38 from him as his pro rata share of the Bank's total recovery of $240,590.69.[7] Petitioner's Bill further sought an injunction against the Bank to prohibit the Bank from pursuing a State Court declaratory judgment proceeding filed by the Bank having as its stated purpose a

6 The Referee's Order in this respect became final; the estate of the bankrupt was completely distributed and was closed.

7 $240,590.69 is the sum of the $225,000.00 evaluation placed upon the building by the Referee, plus the $15,590.69 dividend. Petitioner's pro rata share is computed as follows: $25,000.00 is 6.98% of $358.056.38 - so - 6.98% of $358.056.38 = $16,798.38.

determination of the reasonable amount of attorney's fees due Petitioner for his services in representing the Bank in the bankruptcy proceedings.[8] In addition Petitioner's bill sought foreclosure of his common-law attorneys lien on the $15,590.69 dividend in his possession; an order requiring the Bank to pay the balance of the total allowance up to $25,000.00 and also sought allowance of attorney's fees and court costs for the Petitioner's attorney who brings these proceedings.[9]

The Bank moved to dismiss Petitioner's bill for lack of jurisdiction on the grounds that it was an attempt to remove the State declaratory judgment proceeding to Federal District Court without the requisite diversity and on the ground that the Referee's allowance for attorney's fees was an allowance to the Bank for its own use and benefit and was in no way determinative of the amount of Petitioner's fees nor an allowance directly nor indirectly to Petitioner

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8 The State Court proceedings are being held in abeyance by agreement subject to this Honorable Court's action herein. It should be noted that these proceedings in the District Court were not instituted until after the State Court had summarily dismissed all of Petitioner's contentions which he has presented in these proceedings.

9 Vernon's Annotated Texas Civil Statuts Art. 2226 allows for the recovery of attorney's fees and court costs incident to the recovery of a judgment for personal services rendered. Texas Courts hold and the Fifth Circuit Court has recognized that legal services fall within the purview of said statute. See text of Art. 2226 in Appendix "B" and see Burnett v. Graves, 230 F2 49 (C. A. 5), Urschel v. Crow, Tex. Civ. App. 314 SW2 423 writ refused n.r.e., and Youngblood v. Wilson & Curetan, Tex. Civ. App. 321 SW 2 887 writ refused n.r.e.

for representing the Bank in the bankruptcy proceedings.[10]

The District Court assumed jurisdiction for the limited purpose of giving effect to the Referee's Order, and while holding that the Bank must pay the entire allowance for attorney's fees to Petitioner or return it to the bankrupt estate, refused to enter an order directing the Bank to presently do either upon the apparent conclusion that the Referee's allowance of attorney's fees was not a Judgment as between the Petitioner and the Bank as respects the reasonable value of the services performed by Petitioner in the bankruptcy proceedings. The District Court also refused to stay the State Court declaratory judgment proceedings and denied Petitioner his claim for attorney's fees and court costs under the State statue providing for same.

In its opinion, the Circuit Court affirmed the District Court's order in all things. The opinion evidences no intention to add to or detract from said Order, though some of the comments in the opinion necessarily confuse integral portions of the Order relating to how many of the $240,590.69 dollars are "attorney's fee" dollars.

ARGUMENT

Your Petitioner respectfully submits that the answer to the question hereinabove presented must be

10 The other parties against whom the proceedings in the District Court were brought are beneficiaries of the testamentary trusts. Each adopted the position of the Bank and none have been active in the proceedings since that time.

that Federal Courts alone may lawfully determine allowances against bankrupt estates. Clearly Art. 1 § 8 of the Constitution, supra, and the Bankruptcy Act, specifically Title 11 U.S.C. § 11 (2) and (7), supra, forecloses any serious question that a State Court may directly or collaterally determine or fix any part of a claim filed with a Bankruptcy Court.

There can be no question that it was the intention of Congress as reflected by the Bankruptcy Act and as interpreted by this Court on numerous occasions that the Federal District Courts as Bankruptcy Courts have exclusive and paramount jurisdiction to collect, handle, manage and distribute estates of bankrupts and to decide with judicial finality any and all "controversies in relation thereto."[11] Petitioner submits that it is all the more ridiculous to consider that a State Court may determine allowances "for" Federal Bankruptcy proceedings after the particular allowance in question has been judicially determined by the Federal Bankruptcy Court and where the Order making such determination has become final by law and the bankruptcy proceedings closed.

It appears to be the unwavering position of the Bank that the Referee in Bankruptcy was doing a useless thing when in the exercise of his discretion he determined that $25,000.00 should be the amount charged against the bankrupt's estate on account of the covenant to pay 10% attorney's fees contained in the note held by the Bank, notwithstanding the

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11 U.S. v. Knight 336 U.S. 505

fact that the Bank had voluntarily submitted the collection of the note to the Bankruptcy Court and through its Trust Officer has sworn that it was entitled under said note to attorney's fees of $33,305.64.

While no party is contesting the *validity* of the Bank's claim for attorney's fees as a proper charge against the bankrupt estate, it is helpful to inspect the claim for attorney's fees as same relates to the Referee's authority to allow the fee for the very important reason that the proper "construction" of that claim determines the enforceability or not of the claim in bankruptcy proceedings and how these proceedings should be viewed by this Honorable Court.

A survey of the Bankruptcy Act reflects the absence of any affirmative provision for the allowance of an attorney's fee out of a bankrupt's estate to a non-petitioning creditor where the services of the attorney have been limited to proving the creditor's claim. Title 11, § 104 (a) may be authority for an allowance of attorney's fees to a non-petitioning creditor if his efforts have preserved the estate, uncovered hidden assets or resulted in rejection of an arrangement or wage-earner plan. Section 104 (a) specifically provides for the allowance of attorney's fees to petitioning creditors in involuntary cases and to the bankrupt in involuntary cases and voluntary cases.

If a non-petitioning creditor is to secure an allowance against the bankrupt estate for attorney's

fees some other provision of the Act must be invoked. The proper provision is Title 11, § 103, which sets out the "debts which may be proved." As applied to these proceedings, the following portion of Section 103 is pertinent:

> "Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not * * * (4) a contract express or implied * * * (8) contingent debts and contingent contractual liabilities."

In other words, a creditor may make recovery against the bankrupt estate if he is able to bring his claim within any of the provisions of Section 103.

It is apparent that the Bank's claim was filed and considered by the court under the above-quoted provisions of Section 103. This being true, it is necessary to consider the manner in which the Referee treated the claim in allowing it. Stated simply, it makes sense to look to the claim presented and determine precisely how it was treated by the Referee in the order.

At the outset, it is clear that an unlawful debt would not be allowed as a charge against an estate. In other words, Section 103 presupposes the "regularity" of the bankrupt's debt to the creditor. Hence,

the allowance of a claim presupposes not only that the Referee has concluded that the debt is of a class mentioned in Section 103, but also that it is "regular" and therefore enforceable in bankruptcy. Though the debt be of a class mentioned in Section 103, if it was born in fraud, is payment for illegal consideration, arises out of an unlawful contract or one against State or Federal public policy, or if there exists other impediment, it is rendered unenforceable. This process, therefore, necessarily identifies the substance of the debt. The Referee identifies the debt before he allows it. *In the instant proceeding the Referee identified a number of debts owing from the bankrupt to the Bank, but they were not all allowed. Notwithstanding some fell into a class mentioned in Section 103, they were not "regular," were not therefore enforceable, and were expressly disallowed.*

Looking to the order, it appears that the Referee identified five debts owing from the bankrupt to the Bank:

1. Principal and interest;
2. Ten per cent penalty interest on unpaid principal and interest;
3. Simple interest from and after the date of filing of the petition;
4. Ten per cent of principal and interest owing as attorney's fees;
5. Rental payments collected since the filing of the petition.

Of the debts identified, Nos. 2 and 3 were against Federal policy, were not therefore "regular"

and were disallowed in toto; Nos. 1 and 5 were recognized as "regular" and were allowed in toto; No. 4 was identified as "regular" but discretionary and as such was allowed in part.

In construing the claim and determining the enforceability of the debt consisting of principal and interest, rents, and attorney's fees, the Referee's order reflects the following findings: (1) a note was executed; (2) the note was for value; (3) the note was delivered; (4) the note was a valid and existing obligation of the bankrupt; (5) the note was secured by a valid existing deed of trust lien; (6) the note provided for 10% penalty on matured and unpaid principal and interest; (7) the note provided for attorney's fees in the amount of 10% of principal and interest owing; (8) the Bank was the trustee of two private trusts; (9) The Bank was owner and holder of the note and deed of trust; (10) The Bank placed the note and deed of trust in Petitioner's hands for collection; (11) that the note an deed of trust were in default; (12) that the value of the mortgaged premises was less than the Bank's claim; (13) that the Bank's claim should be allowed as a secured claim; (14) that the Bank should be permitted to foreclose its deed of trust; (15) that the mortgaged premises were burdensome to the bankrupt estate; (16) that the bankrupt estate had no equity in the mortgaged premises; (17) that the amount of principal and interest owing upon filing of the petition was $333,056.38; (18) that penalty interest is not allowable; (19) that simple interest on principal after date of filing of the petition is not allowable; (20) that rents from the premises were secured by the deed of trust and should

be paid to the Bank by the Trustee with an accounting; (21) that attorney's fees were allowable in the court's discretion, and were allowed in the amount of $25,000.00.

It may be fairly said that the Referee's order, in full compliance with General Order No. 23, made all findings necessary and proper to the determination that a secured claim in the amount of $358,056.38, consisting of $333,056.38 principal and interest and $25,000.00 attorney's fees, was enforceable against the bankrupt's estate. The Referee's discretionary allowance of $25,000.00 will always remain an allowance for attorney's fees. Its character will not change.

It would be difficult indeed to envision a more thorough and complete adjudication of a claim presented to the Bar of Justice than that demonstrated by the Referee's order in these proceedings. Is it not apparent from this analysis that a clear, unequivocal and final order has been entered in due course of law by a court having jurisdiction of the subject matter and the parties?

To what more is the Bank entitled? Is the Bank entitled to procure an allowance for attorney's fees in the Bankruptcy Court and use the allowance for another purpose? Is the Bank entitled to secure an allowance for attorney's fees from a Bankruptcy Court and keep part of the allowance for itself, though it is not an attorney and performed no such services? Is the Bank entitled to verify an attorney's fee claim for

$33,305.64 in the Bankruptcy Court, secure and accept the benefits of an allowance for $25,000,00. and then proceed to State Court seeking a determination of the reasonable value of the same allowance? Is the Bank entitled to withhold from Petitioner, its attorney, the allowance for attorney's fees the Referee has allowed and paid to the Bank? Petitioner respectfully says that this Court's answer to these questions must be a resounding "No." The Bank has had its day in court.

It might be well to emphasize the fact that the claim amounted to a first mortgage lien and as such was allowed by the Referee as a secured claim to the extent of the security, with the balance being allowed as an unsecured claim. The allowance for attorney's fees was considered by the Referee as part of the claim itself and was allowed as a part of it. The effect here, of course, is that the pro rata portion of the $240,590.69 paid by way of the allowance is treated as a lien against the security. Simply stated, the Referee treated the attorney's fee allowance as a lien against the security for the note. Hence, it is evident that the Referee intended the Petitioner to participate fully with the Bank in all monies or property recovered by the Bank. It is impossible, Petitioner believes, to view the Referee's order differently. The Referee has simply determined: that the bankrupt was obligated to pay attorney's fees; that the necessary requisites for such an allowance, as set forth in the note, had been complied with, i.e., the note was collected by an attorney through bankruptcy proceedings; and that the amount of allowance was discretion-

ary and the Referee than entered his allowance in the exercise of his discretion.

It necessarily follows that the opinion of the lower court is incorrect. An inspection of the order appealed from indicates that the court must have felt that a necessary predicate to ordering the Bank to pay over the money was a finding that the Referee's order amounted to a "judgment" on Petitioner's behalf against the Bank, for as pointed out above, the lower court held that the Referee's allowance was in no way **** " a judgment for attorney's fees * * * binding on the Bank ****" for Petitioner's services in the bankruptcy proceedings. It is, of course, not necessary for the Referee's order to be a "judgment," for under the authorities an allowance of attorney's fees is, under Texas law, prima facie evidence to the Court that the creditor and the attorney have agreed that the attorney will be paid at least the amount of attorney's fees claimed, and if the amount asserted is within the amount stipulated in the note, and if the Court finds the same to be reasonable, the Court will then make the allowance. The allowance, not only under the Texas authorities, but under all of the Federal authorities which deal with this matter, is an allowance FOR the attorney. A principle implied in all of these decisions and which is of paramount importance, is the fact that the Referee has complete and sole jurisdiction over the bankrupt's entire estate. Inasmuch as the Referee is administering a fund, he has plenary authority to distribute it. Hence, it is not necessary to hold that the Referee's order amounts to a "judgment" against the Bank to reach the con-

clusion that the order is determinative of the Petitioner's right to participate in the monies paid in satisfaction of the Bank's claim to the extent of the allowance. The enforceability of such a note in bankruptcy proceedings necessarily requires that the Referee see to it that the allowance is paid to the attorney. It is of course upon the implied representation when the claim is filed that the allowance of attorney's fees will be paid to the attorney that the Referee makes the allowance in the first place. It is obvious that no Referee would make an allowance for attorney's fees if at the time the claim is filed the creditor-client states to the Referee that the attorney will not be paid any of the fee. In such a situation no allowance would be made, and a creditor would have to pay his client out of his own pocket. This is another point of importance. The money which the Bank now holds as an attorney's fee never belonged to the Bank. This money belonged to the bankrupt estate, title to which was in the Trustee and the sole authority to distribute which was in the Referee. If the Referee makes an allowance from the bankrupt estate FOR Petitioner, how is it that the Bank can complain when under no theory of law could the Bank ever have any claim to the fund paid?

Another aspect of the order that should be discussed at this point is the portion of the order where the court states that any of the attorney's fees realized by the Bank and not paid to Petitioner "inures" to the benefit of the creditors of the bankrupt. On the surface, this is probably a correct view but it is an over-simplification of this aspect of the matter.

Petitioner would point out in this regard that at all times there has been complete accord between Petitioner and the Bank respecting the agreement for the payment of attorney's fees. The same was true in the proceedings before the Referee as a matter of law, for, when Petitioner and the Bank filed the claim they submitted themselves to the jurisdiction of the Bankruptcy Court for adjustment of rights between them. The filing of the claim was prima facie evidence of an agreement between the parties that such allowance would be paid to Petitioner. In these proceedings the Bank has consistently asserted that it is ready, willing and able to pay a reasonable fee and that it is bound to pay a reasonable fee to Petitioner since in the absence of any firm agreement between the two, the law writes an implied contract to pay a "reasonable fee." Since it has been established that the money which the Bank holds as an attorney's fee belongs to Petitioner and since the amount thereof has been determined by the Referee in the exercise of his discretion to be "reasonable," and since the Bank has at all times said it was ready to pay a reasonable fee to Petitioner, what more needs to be done than for the Bank to pay the money over to Petitioner? In other words, the Referee's allowance of attorney's fees cannot "inure" to the bankrupt's creditors for the very simple reason that all of it belongs to Petitioner.

Both the District and Circuit Courts recognized the sound proposition that the Bank could not "profiteer" at the expense of the attorney and retain to itself monies carved from the bankrupt's assets as an attorney's fee. Paragraph (3) of the District Court's

Judgment, affirmed by the Circuit Court reads:

> (3) Any portion of the attorney's fees allowed by the Referee in No. BK 63-52, and which is realized on a pro rata basis out of money actually collected, or represented by property received by the bank, but not paid to the attorney, inures to the benefit of the creditors entitled thereto, and must be returned by the bank to the bankrupt estate for distribution to them ****"

However the District Court and the Circuit Court are at complete odds in their determination of the number of dollars constituting "attorney's fees allowed by the Referee in No. BK 63-52 * * * realized on a pro rata basis." The District Court was clearly of the opinion that its Paragraph (3), converted into dollars would equal Petitioner's asserted figure of $16,798.38.[12] The Circuit Court after affirming the District Court's order which includes Paragraph (3), purported to "comment" on Paragraph (3) and concluded that only approximately $2,930.00 was the number of dollars of the $240,590.69 recovered by the Bank "by reason of the allowance of attorney's fee(s) as a part of its claim." Using the same formula to-wit, Paragraph (3) of the District Court's Order, the District Court and Circuit Court are $13,868.38 apart. This discrepancy is obviously caused by the Circuit Court's failure to include in its computations

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12 See Second Supplemental Reproduced Record as follows:
Page 4 lines 13-23
Page 9 lines 3 through Page 10, line 2
Page 10 lines 14-19
Page 19 lines 12-18
Page 30 lines 20-24

"any portion of the attorney's fees allowed by the Referee * * * realized on a pro rata basis * * * represented by property received by the Bank ****" as required by Paragraph (3) of the Order affirmed by the Circuit Court. This inherent contradiction in the Circuit Court's opinion is irreconcilable. Petitioner in a lengthly motion for Rehearing mathematically demonstrated this conclusion to no avail.

If it is this difficult for the District and Circuit Courts to agree in this matter the problem will only become compounded if certiorari is denied and the State Court case is then prosecuted to conclusion. This will take a minimum of 18 months after which Petitioner and the Bank must return to the District Court for a determination of how much money, if any ****"realized on a pro rata basis out of money actually collected or represented by property received by the Bank, but not paid to the attorney * * * must be returned by the bank to the bankrupt estate ****" At this juncture the District Court will be faced with the dilemma of choosing between its announced conclusion that $16,798.38 of the $240,490.69 recovered by the bank belongs to the attorney or adopting the Circuit Court's method of ignoring the terms of Paragraph 3 of the Order relating to the $225,000.00 property recovered by the bank and concluding that only $2,930.00 of the $240,590.69 is the sum certain "by reason of the allowance of attorney's fees as part of the bank's claim."

Petitioner most respectfully submits that his argument demonstrates not only the illegality of

permitting a State Court to allow claims in Federal bankruptcy proceedings, but also the practical impossibility of such a procedure. For unless the State Court by the most rarest of coincidences determines that Petitioner is entitled to $25,000.00 for services rendered the Bank in the bankruptcy proceedings, the inevitable and inexorable result will be an unequal distribution of the bankrupt's assets as between the creditors. This result is the specific vice which Congress seeks to avoid through the Bankruptcy Act. enacted pursuant to Art. 1 § 8 of the Constitution. There can be no "uniformity" to such a procedure.

Several questions might legitimately be asked - what if Petitioner's argument is sound, of what importance is it generally? Is it much ado about nothing? Will the rule announced by the Circuit Court apply to other cases?

Petitioner would say that his argument is of great general importance; that it is not much ado about nothing and that the rule announced by the Circuit Court relates TO EACH AND EVERY BANKRUPTCY PROCEEDING IN THE UNITED STATES, for without question in every bankruptcy proceeding claims containing convenants for the payment of attorney's fees are filed and allowed. But what is happening to the attorney's fees allowed on these claims? Are the fees actually going to the attorneys? Is the fee which to its extent depletes the bankrupt's assets actually paid as "attorney's fees" as contemplated by the bankrupt when he executed the note or are creditors "profiteering" and keeping attorney's fees themselves though they be not attorn-

eys and perform no such services? Every bankruptcy proceeding is fraught with claims secured by chattel mortgages, conditional sales contracts, security agreements, deeds of trust, and mortgages of every kind and description, all of which are universally hinged to a written obligation - a promissory note - providing for the payment of attorney's fees in the event of default and collection by judicial proceeding. One can only guess how many millions of dollars each year are paid as attorney's fees by the combined orders of all of the Referees in bankruptcy throughout the country. It is a known fact that a large percentage of creditor claimants falling in this category are banks, savings and loan institutions, finance companies, and other financial institutions which maintain a staff of attorneys as employees or on retainer. Petitioner asserts that substantial amounts of monies are siphoned out of all bankrupt estates under the guise of attorney's fees and that such financial institutions never intend that "their attorney" should receive the amount allowed as attorney's fees.

The record in this case dmonstrates an urgent need for an authoritative decision by this Honorable Court stating that no bankrupt estate may be depleted by the allowance of an attorney's fee unless such fee is allowed by the Referee for actual services rendered by the particular attorney appearing in the bankruptcy proceedings and further requiring that such monies be paid to him.

SUMMARY

The flaw in the decisions of the Courts below

is their failure to recognize not only the exclusive province of the bankruptcy court in allowing or disallowing claims but the specific proposition, as applied to the specific facts of this case, that it is unnecessary to a disposition of this case to determine whether or not the Referee's Order allowing the attorney's fees amounts to a "judgment" on Petitioner's behalf against the bank. This is true because the funds used to pay the attorney come from the bankrupt estate. The funds neither belong to the bank nor can the bank have any lawful claim upon any part thereof. Consequently, though in a true sense the attorney's fees allowance forms a part of the claim "allowed to the bank" the legal effect is to constitute the bank a trustee to the extent of the attorney's fees paid to it for the specific use and benefit of its attorney.This is the rational of the Tenth Circuit's opinion in Webster Drilling Company v. Walker, 286 F. 2 114 which not only concludes that a creditor may not retain an allowance of attorney's fees in Texas, but also holds on authority of this Court's opinions in Brown v. Gerdes, 321 U.S. 178, 64 S. Ct. 487, 88 L ed. 659, and Leiman v. Guttmann, 336 U.S. p. 1, 69 S. Ct. 71 and 93 L ed. 453, that a Referee has wide discretion in allowing attorney's fees and holds further that a Referee's final order allowing or disallowing a claim for attorney's fees based on a note and secured by a deed of trust is res judicata of the amount of the fee.

The opinion of the Court below as respects the issue of res judicata is diametrically contrary to the rule of the Tenth Circuit in Webster, supra.

PRAYER

WHEREFORE PREMISES CONSIDERED, Petitioner prays that because of the stated conflict between the Circuits and because of the important question as to whom, how, when, and under what circumstances and whether by State or Federal Courts attorney's fees may be paid to non-petitioning creditors out of bankrupt estates, Petitioner respectfully urges this Honorable Court to issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that said Court's final decision in Case Number 24,779 on the docket of said Court, and styled Louis LeLaurin v. Frost National Bank of San Antonio, Texas, as Trustee under the will of Jack Ammann, Deceased, et al; also styled Frost National Bank of San Antonio, Texas, as Trustee under the will of Jack Ammann, Deceased, v. Louis LeLaurin.

FRANK Y. HILL, JR.
Alamo National Building
San Antonio, Texas

EDWARD V. DYLLA
Majestic Building
San Antonio, Texas
Attorney of Records

Attorneys for Petitioner
on Petition for Writ of
Certiorari.

AFFIDAVIT OF SERVICE

I, Frank Y. Hill, Jr. one of the attorneys for the Petitioner, herein, and not a member of the bar of this Honorable Court, hereby certify that, on the 18th day of September, 1968, I served copies of the foregoing Petition for Writ of Certiorari on Respondents Frost National Bank of San Antonio, Trustee, Dorothy Lee Ammann, David and Mary Jane Ammann, Jack Ammann, Jr., and St. Marys University of San Antonio, Texas, by depositing the same in a United States Post Office with first class Postage Prepaid, addressed to said Respondents Council of Record as follows:

John R. Locke
Attorney for Frost National
Bank, Trustee
Milam Building
San Antonio, Texas

John P. Giles & Joe P. Smyer
Guardians Ad Litem for
David Lee and Mary Jane
Ammann
Milam Building
San Antonio, Texas

John Benbow
Attorney for
St. Marys University
2700 Cincinnati
San Antonio, Texas

Frank J. Greene
Attorney for
Dorothy Lee Ammann
2715 San Pedro
San Antonio, Texas

Jack Ammann, Jr. pro se
603 Mauze
San Antonio, Texas

Frank Y. Hill, Jr.

Before me, the undersigned authority, on this day personally appeared Frank Y. Hill, Jr., known to me to be the person who affixed his name to the above and foregoing instrument and who, after being duly sworn, upon his oath deposed and said that the matters stated therein are true and correct and that he executed the same for the purposes therein stated.

IN EVIDENCE WHEREOF, witness my hand and seal of office this the 18th day of September, 1968.

George R. Adam
Notary Public in and for
Bexar County, Texas

SEAL

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24779

LOUIS LeLAURIN,

Appellant,

versus

FROST NATIONAL BANK OF SAN ANTONIO, as Trustee under the Will of JACK AMMANN, Deceased, ET AL.,

Appellees.

FROST NATIONAL BANK OF SAN ANTONIO, as Trustee under the Will of JACK AMMANN, Deceased,

Appellant,

versus

LOUIS LeLAURIN, ET AL.,

Appellees

Appeals from the United States District Court for the Western District of Texas

(March 21, 1968)

Before RIVES, GEWIN and THORNBERRY, Circuit Judges.

RIVES, Circuit Judge: The appellant attorney initiated this proceeding against the appellee Bank for the recovery of an attorney's fee. While the necessity for litigation over attorney's fees is always regrettable, in this case the courts must settle honest differences of opinion on which the parties have not been able to agree. All of the parties are citizens of Texas. If federal jurisdiction exists, it arises from a Referee's order in a bankruptcy proceeding which included a large attorney's fee, $25,000.00, in the amount of a claim allowed to the Bank as a non-petitioning creditor. We affirm the carefully considered judgment of the district court, the body of which reads as follows:

> "(1) This Court has jurisdiction of this matter to the limited extent necessary to protect and effectuate the referee's order dated June 15, 1964.
>
> "(2) Under Texas law, the usual attorney's fee clause in a note is in the nature of a contract of indemnity with respect to actual expenses, and cannot be regarded as providing for liquidated damages or a penalty.
>
> "(3) Any portion of the attorney's fee allowed by the referee in No. BK-63-52, and which is realized on a pro rata basis out of money actually collected, or represented by property received by the bank, but not paid to the attorney, inures to the benefit of the creditors entitled thereto, and must be returned by the bank to the bankrupt

estate for distribution to them.

"(4) Under the circumstances of this case, the referee had no jurisdiction to render a judgment for attorney's fees on behalf of the attorney, which is binding upon the bank. The attorney must look to the client and not to the bankruptcy court for his compensation.

"(5) The doctrine of res judicata does not apply with respect to the controversy between the bank and its attorney regarding the payment of an attorney's fee.

"(6) The bank is estopped to question the appraised value of the property.

"(7) This Court will retain jurisdiction to fix the compensation of the guardians ad litem, and thereafter until such time as it is determined whether or not any portion of the amount allowed to the bank in the form of attorney's fees is to be returned to the bankrupt estate pursuant to paragraph (3) of this order.

"(8) Petitioner's request that prosecution of the case in State Court be enjoined, is denied.

"(9) The motions to dismiss are denied.

"(10) Each guardian ad litem shall promptly submit his claim for services rendered, and the total amount shall be taxed as costs in the case.

"(11) Costs shall be divided equally between the Petitioner and the bank.

"(12) All relief not herein specifically granted is denied."

The Bank, as trustee, held a note originally in the sum of $350,000.00 executed by Geotechnics and Resources, Inc., and secured by a mortgage on real property located in San Antonio, Texas. The maker of the note was declared a bankrupt, and the Bank employed the attorney to represent it in prosecuting its claim on the note in the bankruptcy proceedings. No agreement was made as to attorney's fee.

At the time of the adjudication of bankruptcy, there was a balance owing on the note of $333,056.38. The note provided for an additional ten per cent as attorney's fees if placed in the hands of an attorney for collection or collected through judicial proceedings. The Referee's holding as to attorney's fees was expressed as follows: "Attorney's fees stipulated for in said note of February 1, 1963, are allowable at the discretion of the Court, and the same hereby are allowed in the amount of $25,000.00." This sum was added to the $333,056.38 balance owing on the note to make a total of $358,056.38, which the Referee allowed as a secured claim. The mortgaged premises were valued at $225,000.00, were determined to be burdensome, and the Trustee in Bankruptcy was directed to abandon them to the Bank. The Bank was given leave to foreclose its mortgage.[1] The Referee reduced the Bank's claim as allowed by that amount, leaving a balance of $133,056.38 which was allowed as an unsecured claim. Dividends on that claim in the amount of $15,590.69 were paid by the Trustee in Bankruptcy to the attorney, which he retains in his

1 The Bank thereafter foreclosed its mortgage, bid the property in at $225,000.00, and took possession of the premises.

possession under a claim of lien for his fee. The bankrupt estate has been completely distributed. $2,500.00 has been paid by the Bank on the attorney's fee, and all parties concede at least that much to be reasonable.

The Bank sought a declaratory judgment from a Texas state court to fix the amount of a reasonable fee to be paid its attorney for the services herein involved. Thereafter, the attorney filed the present complaint in the federal court "to enforce final orders and decrees of this Court" in the bankruptcy proceeding.

The crucial question to be decided is the effect as between the Bank and its attorney of that part of the Referee's order allowing the Bank's claim which includes in the amount allowed $25,000.00 as attorney's fee.

The contract itself was between the maker and the payee of the note. The rights and obligations as between those two are governed by state law and are well stated in *Kuper v. Schmidt*, Tex. 1960, 338 S.W. 2nd 948, 950.

> "It is now settled that as between the legal owner and holder of a promissory note and those who are obligated to pay the same, the former is prima facie entitled to recover the attorney's fees stipulated therein upon the happening of the contingency which makes the same payable. In the absence of an issue

affirmatively tendered by the defendant, it is not necessary for the plaintiff to prove an agreement to pay such fee to an attorney or that the same is reasonable. The usual attorney's fee clause is, however, in the nature of a contract of indemnity and cannot be regarded as providing for liquidated damages or a penalty. Upon a proper showing the holder will be limited to an amount which is reasonable under the circumstances, and may be denied any recovery where it appears that no expense has been incurred as a result of the maker's default."

The contract being in the nature of a contract of indemnity, the Bank cannot be permitted to make a profit to itself by stipulating for a larger fee or having included in its allowed claim a larger amount than the reasonable attorney's fee it will have to pay. *Merchants' Bank v. Thomas,* 5th Cir. 1903, 121 Fed. 306, 312.

The attorney relies strongly upon the following expression in this Court's opinion in *Central Loan Co. v. Russell,* 1923, 16 F.2d 35, 36:

"It is admitted that under the law of Texas attorney's fees stipulated in a note become the property of the attorney employed to collect it and do not in any way go to the holder of the note."

That expression was dictum and was not a holding of the Court. It was no more than an admission of

the parties that such a rule would be equitable under the facts of that case. It was not intended to and did not establish a rule of law. Indeed it could not, for it finds no support in the law of Texas.

The Referee in Bankruptcy did not undertake to allow a fee directly to the attorney. He simply allowed as part of the Bank's claim indemnity against the reasonable fee which the Bank might thereafter pay its attorney. True, the Referee arrived at a definite amount of such indemnity. So long as the status remained unchanged, that amount was binding as between the Bank and the Trustee in Bankruptcy. If, however, it should thereafter appear that the Bank owed its attorney a lesser fee than the amount collected on such allowance, the Bank would have to return the excess to the bankrupt estate.

The attorney was not a party to the proceeding in bankruptcy, nor was he in privity with his client, the Bank, in such sense that he could claim the Referee's order to be a final judgment binding as res adjudicata against the Bank as to the amount of the attorney's fee. See *Bigelow v. Old Dominion Copper Co.*, 1912, 225 U.S. 111, 126, 127; *Kirby Lumber Co., v. Southern Lumber Co.*, Tex. 1946, 196 S.W.2d 387; *Groves-Barnes Lumber Co. v. Freeman*, Tex. Civ. App. 1930, 33 S.W.2d 218; 30A Am. Jur., Judgments; § § 399, 400; 50 C.J.S., Judgments; § 756, pp. 276 277.[2]

2. Some courts have held the attorney estopped to claim a larger fee. See 50 C.J.S., Judgments, Section 780, pp. 315, 316, and cases cited. That question is not presented in this case. Clearly there is no estoppel against the Bank when no issue was presented to the Referee as between the Bank and its attorney, and the Bank had no representation before the Referee except by the attorney himself.

To avoid being misunderstood, we should comment on some parts of the district court's judgment.

Paragraph 3 relates to the portion of the attorney's fee allowed by the Referee which may possibly have to be returned by the Bank to the bankrupt estate. The balance owing on the note of $333,056.38, before the addition of the $25,000.00 attorney's fee, was far in excess of the value of the mortgaged property, $225,000.00. The Bank would have received that much irrespective of the allowance of attorney's fee.[3] The Bank's unsecured claim as allowed was $133,056.38. On that claim the bankrupt estate paid to the Bank's attorney $15,590.69, which amounted to approximately 11.72% of the total unsecured claim. If we assume that the unsecured claim was increased by the entire $25,000.00 allowed as attorney's fee, the additional dividends paid on account of such allowance, at 11.72% would be approximately $2,930.00, or only $430.00 more than the $2,500.00 paid by the Bank to its attorney. That seems probably the extent of the difference which the Bank has collected by reason of the allowance of attorney's fee as a part of its claim. The bank concedes that it is highly improbable that the state court will fail to award the attorney at least that additional sum. Thus there is very little likelihood of a necessity for the return of any amount by the Bank to the bankrupt estate for distribution to the creditors.

---

3 Of course, we do not intimate that the attorney rendered no services in securing the abandonment of the mortgaged property, or that its value should not be considered in determining a reasonable fee.

Paragraph 11 of the district court's judgment taxes the costs equally against the Bank and the attorney. The Bank cross-appealed from that part of the judgment and now urges that the court abused its discretion. Rule 54(d) of the Rules of Civil Procedure commits the taxation of costs to the discretion of the district court, and appellate review is extremely limited. See 6 Moore's Federal Practice 2nd ed. ¶54.70(5), pp. 1308-1313. Under all of the circumstances of this case, we find no abuse of discretion on the part of the district court. The judgment is therefore affirmed. The costs of appeal are taxed against the appellant attorney.[4]

AFFIRMED.

4 See 28 U.S.C.A. Section 1912; Fifth Circuit Rule 31, ¶ 2

APPENDIX "B"

Vernon's Annotated Texas Civil Statutes Art. 2226

Any person having a valid claim against a person or corporation for personal services rendered, labor done, material furnished, over charges on freight or express, lost or damaged freight or express, or stock killed or injured, or suits founded upon a sworn account or accounts, may present the same to such person or corporation to to any duly authorized agent thereof; and if, at the expiration of thirty (30) days thereafter, the claim has not been paid or satisfied, and he should finally obtain judgment for any amount thereof as presented for payment to such person or corporation, he may also recover, in addition to his claim and costs, a reasonable amount as attorney's fees, if represented by an attorney. Acts 1909, p. 93; Acts 1923, p. 312, Acts, 1949, 51st Leg., p. 915, c. 494, § 1; Acts 1953, 53rd. Leg., p. 101, c. 67, § 1.

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No. 541

IN THE

SUPREME COURT OF THE UNITED STATES

LOUIS LeLAURIN
Petitioner

v

FROST NATIONAL BANK, TRUSTEE et al
Respondents

RESPONDENTS' REPLY BRIEF TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

JOHN R. LOCKE
ATTORNEY FOR RESPONDENT,
Frost National Bank of San Antonio,
Trustee

KELSO, LOCKE & KING
635 Milam Building
San Antonio, Texas 78205
Of Counsel

C. STANLEY BANKS, JR.
640 MILAM BLDG. SAN ANTONIO

CLEMENS PRINTING COMPANY - SAN ANTONIO, TEXAS

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Preliminary Statement

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, FROST NATIONAL BANK OF SAN ANTONIO, Trustee under the Will of Jack Ammann, Deceased, respectfully presents herewith its brief reply to the Petitioner's application for Writ of Certiorari to this Court. Respondent has not been furnished with a copy of the certified record filed in this Court and apologizes for its inability to refer to it.

JURISDICTION

Respondent respectfully submits that Petitioner presents no grounds of jurisdiction for the intervention of this Court.

His first ground is that the decision of the Circuit Court of Appeals is in conflict with the decision of another Court

of Appeals. He does not name the decision with which he claims there is a conflict. If he contends that the decision in this case is in conflict with Webster Drilling Co. v. Walker, 286 F 2d 114, even a casual reading of this decision will show that it has no application whatever to the issues in this case. Clearly, he has demonstrated no conflict.

His next ground is that the decision of the Circuit Court of Appeals "involves an extremely important question of Federal law." Actually, the decision does not involve a question of Federal law, but merely involves the proper construction of the State Law. Petitioner, in his Brief in the Circuit Court of Appeals, in referring to the case of Security Mortgage Co. v Powers, 278 U.S. 149, says:

> "According to Powers, supra, the validity and construction of the claim for attorneys' fees as part of Appellee's claim presented by Appellant must be viewed from the standpoint of Texas law."

This was the holding of the Powers case, and Petitioner, himself, admits that the question involved in this case is one based upon State law, not Federal law. Neither is the matter one of importance save to Petitioner, himself. It would only become important if this Honorable Court chose to overturn the decision of the Circuit Court of Appeals, for, in that event, it would be establishing a completely new rule of law which is not supported by any authority in the United States.

Surely, Petitioner shows no reasonable grounds for this Court to assume jurisdiction.

QUESTION PRESENTED

Petitioner presents no assignments of error. He merely says under his title "Question Presented:

> "Whether the State or the Federal Courts shall determine allowances against bankrupt estates for attorneys' fees upon claims allowed by a referee in bankruptcy?"

The above quotation, which Petitioner appears to advance as the question to be decided by this Court, is a complete misconception of the issue in this case. No such issue is now or ever was involved in this case. Petitioner's statement would appear to be an effort to present to this Court something that might appeal to it which is actually not in the case at all.

The issue in this case is very simple. No one has questioned the authority of the Bankruptcy Court to determine the amount of attorneys' fees allowed to a claimant upon his claim. What Petitioner contends is that this allowance is also a determination of the amount of the fee the claimant must pay his attorney.

Respondent, the Bank (as it will hereafter be referred to), as Trustee of a Testamentary Trust, held a note, secured by real estate, upon which, at the time of the bankruptcy, there was owing the sum of $333,056.38. The note was in the usual form, providing for 10% attorneys' fees if placed with an attorney for collection. The Bankruptcy Court allowed the claim in full as a secured claim, but, instead of allowing the full 10%, allowed $25,000.00 attorneys' fees to the holder of the note. The real estate was worth much less than the balance owing upon the note and was accordingly abandoned by the Trustee in bankruptcy and its appraised value was credited upon the Bank's claim in the manner provided by the bankruptcy laws leaving a balance owing on the unsecured claim, including the attorneys' fees, of $133,056.38.

Petitioner's contention in the Trial Court was that the allowance of the $25,000.00 attorneys' fees to his client, the

Bank, was, in effect, the allowance of this amount to him and that this amounted to a legal adjudication that his client owed him $25,000.00 (C.C.A. Record Page 1). This contention was made despite the fact that, admittedly, there was no hearing on the matter as between himself and his client and that his client had no representation before the Bankruptcy Court except by himself. When this contention was overruled by the District Court, Petitioner, in the Circuit Court of Appeals, then contended that the allowance of the $25,000.00 attorneys' fees to his client gave him, as a matter of law, a proportionate part (25,000/358,056.38) of the value of everything that the Bank recovered on its claim, which he computed to be $16,798.38.

Petitioner cites no case and Respondent is confident that no case can be found by any Court in the United States which supports the rule contended for by him. The cases cited by him on Page 23 of his Petition for Certiorari have absolutely no application to this question. Despite the fact that attorneys' fee provisions are standard in promissory notes in Texas and in many other states and that there must be tens of thousands of cases in which attorney fees have been allowed to the holders of notes, Respondent has been able to find only two cases in the legal reports in the United States in which any one has made a contention similar to that advanced here by Petitioner. In both of these cases (one of which is from Texas) the contention was rejected on the ground that the allowance was made to the holder of the note as indemnity to him and his attorney had no interest in it. Groves-Barnes Lumber Company v Freeman, Tex. Civ. App., 33 S.W.2d 218. Dublin Veneer Company v Chappel and Burch, 31 Ga. App. 700, 121 S.E.866.

The Circuit Court of Appeals held that any dividends collected by the Bank from the Bankrupt Estate which were

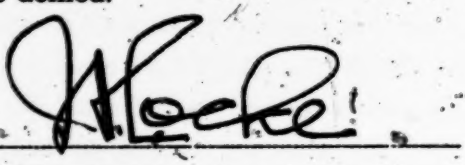
attributable to the $25,000.00 attorney fee allowed to it, must be paid to the Bank's attorney or returned to the Bankrupt Estate. This, of course, is based upon the equitable rule that a creditor would not be permitted to obtain a preference over other unsecured creditors by receiving a dividend upon the sum allowed to him as attorneys' fees when he actually did not owe the attorney fees. In our case, the only dividends collected by the Bank upon its claim, which were attributable to the increase of its unsecured claim by the allowance of the $25,000.00 attorneys' fees, amounted to $2,930.00. The Bank had already paid its attorney $2,500.00 and conceded in its Brief in the Circuit Court of Appeals that the attorney would probably be reasonably allowed at least the total sum of $2,930.00 and expressed a willingness to pay him that amount. Thus, as the Circuit Court of Appeals said, there seemed to be very little likelihood that anything would have to be returned to the Bankruptcy Court.

CONCLUDING REMARKS

Rspondent, the Bank, has never questioned the right of Petitioner to a reasonable fee, but, as a Trustee, it did not feel authorized to pay him more than a reasonable fee. If the Petition for Certiorari is denied, Petitioner will be awarded and paid a reasonable fee under the order of the State Court in Respondent's suit for a declaratory judgment to determine the amount of the fee. He will not be prejudiced in any way. The opinion of the Circuit Court of Appeals correctly states the facts and follows the settled law and is sound and equitable. To adopt Petitioner's theory would make it unsafe for a note holder to place his claim with an attorney for collection without agreeing in advance on the fees to be charged. It would not seem that this Hon-

orable Court would care to concern itself with passing upon a theory so novel and so completely unsupported by any authority and which would not appear to be in the public interest. Nor would it seem equitable to burden the trust which Respondent is administering with the very substantial cost of another hearing.

Respondent respectfully prays that Petitioner's motion for a Writ of Certiorari be denied.



JOHN R. LOCKE
635 Milam Building
San Antonio, Texas 78205
ATTORNEY FOR RESPONDENT,
Frost National Bank of San Antonio,
Trustee

KELSO, LOCKE & KING
635 Milam Building
San Antonio, Texas 78205
Of Counsel

CERTIFICATE

I, John R. Locke, attorney of record for Respondent, Frost National Bank of San Antonio, Trustee, hereby certify that a true and correct copy of the above and foregoing reply brief has been served upon all other parties to these proceedings, or their counsel, by placing the same in the United States Mail with the proper amount of postage affixed thereto and properly addressed to them as shown below on the_____day of October, 1968.

FRANK Y. HILL, JR.
Alamo National Building
San Antonio, Texas
Attorney for Petitioner

JOHN P. GILES
Guardian Ad Litem for
David Lee Ammann
Milam Building
San Antonio, Texas

JOE P. SMYER
Guardian Ad Litem for
Mary Jane Ammann
National Bank of
Commerce Building
San Antonio, Texas

JOHN BENBOW
Attorney for St. Mary's University
Kallison Tower
San Antonio, Texas

FRANK J. GREENE
Attorney for Dorothy Lee Ammann
2715 San Pedro
San Antonio, Texas

JACK AMMANN, JR. pro se
603 Mauze
San Antonio, Texas

JOHN R. LOCKE
Attorney for Respondent